## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: October 12, 2000

TO : F. Rozier Sharp, Regional Director

Region 17

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice 512-5036-6786

524-5029-4300

SUBJECT: LBT, Inc. 530-6067-4033-5900

Cases 17-CA-20235, 17-CA-20300 530-8063

These Section 8(a)(5) cases were are submitted to Advice on the issues of (1) whether the Employer's refusal to grant "shutdown" pay to unit employees during a strike constituted an unlawful denial of accrued benefits, and (2) whether copies of the employee evaluations used by the Employer to structure a 1997 layoff remain relevant and necessary in view of the fact there was no layoff in 1999.

## <u>FACTS</u>

The Employer manufactures truck trailers. In 1994, the Employer purchased Fruehauf, Inc. and recognized the Union as the bargaining representative for the production and maintenance employees. The parties first contract was effective from February 19, 1994 to December 31, 1994. In that contract, employees received approximately four weeks paid vacation. Two of those weeks were from July 1-10, 1994 during which time the plant was shut down. The Employer paid the employees for one week at the time of the shutdown, but deferred payment of the second week of shutdown pay until December 1994.

The next contract, effective from January 1, 1995 to June 14, 1997, gave employees from 21 to 22 days paid vacation, depending on the year. The contract provided that "in normal years six (6) days will be designated holidays and ten (10) days will be designated vacations during which the plant will be shut down." The remaining five (5) days were designated as "floaters". The plant was shut down for all but individual "floater" days.

In 1995, the plant was shut down from July 3-7. In 1996, the plant was shut down from July 1-5. In 1997, the plant was shut down from June 30 to July 4. In 1998, the plant was shut down from June 29 to July 3.

The 1997 to 1999 contract provided:

"It is understood that vacations and holidays are based on 12 month years and therefore any newly hired and any retiring employee working less than a twelve (12) month year will have his/her "floater" days pro-rated by the amount of the year he/she works." Article XV, Duration of Agreement, of the 1997 to 1999 contract also provided that:

This agreement will render irrelevant, null, void, and without effect the terms and conditions, of any previous written, or implied Agreement between the parties thereto....

Under the 1997-1999 collective-bargaining agreement, once an employee completed a 90-day probationary period and became a regular employee, he was paid for the July shutdown, without regard to his length of service. On the other hand, employees who retired, quit, or were terminated before the beginning of the July shutdown were not given pro-rata pay for the shutdown.

For the first time in their bargaining relationship, the parties failed to reach a successor agreement before the 1997-99 contract expired, and the Union struck the Employer from June 12 to August 8, 1999. During the strike, the plant was in substance shut down. The parties reached a new contract with a term from August 8, 1999 until August 10, 2001. In the negotiations that led to the 1999-2001 contract, the Union asked the Employer to pay shutdown pay for the summer of 1999 to all employees, strikers and nonstrikers alike. The Employer refused the Union's request, paying neither the strikers nor the crossovers any shutdown pay. There is no evidence that the Union waived any employee rights to the shutdown pay.

During the bargaining the Employer on July 13 informed the Union that the strike would probably result in a loss of orders and in layoffs, and that the Employer would use the same evaluation/ranking system to determine who would be laid off as it did during the 1997 layoffs. The Union

<sup>&</sup>lt;sup>1</sup> This provision is similar to that found in the 1995-1997 contract.

<sup>&</sup>lt;sup>2</sup> The Region has found that during the strike, the plant operated at a very reduced level of production. Thus, during the strike with over 95% of the employees not working, the workforce consisted of supervisors plus seven crossovers (of some 135 employees).

asked for copies of the evaluation ranking system and for the scores of all the employees, those who had been laid off and those who had not. The Employer declined to provide the scores of those who had not been laid off. Contrary to the Employer's prediction, there was no layoff in 1999.

The new contract continued the language from Article 15 of the 1997-99 contract that rendered "null, void and without effect" the terms and conditions of all prior agreements, expressed or implied, and incorporated the rating system used during the 1997 layoffs. The Employer disputes the relevance of the scores of the employees rated in 1997 who had not been laid off.

Upon the Union's charges, the Region issued a complaint alleging that the denial of shutdown pay and the refusal to provide the requested information violated Section 8(a)(5). The Region postponed the hearing indefinitely and submitted both Section 8(a)(5) issues to Advice.

## ACTION

We conclude that the Region should continue its proceedings alleging that the Employer violated Section 8(a)(5) by refusing to pay all employees July vacation/shutdown pay. For the reasons set forth by the Region, we agree that the refusal to provide the requested information violated Section 8(a)(5).

1. Shutdown pay survived contract expiration.

The Employer asserts that summer shutdown pay did not survive the contract's expiration because it was a benefit grounded solely in the parties' contract, i.e., since there was no explicit contractual provision for a shutdown in the summer of 1999, no shutdown pay was due and owing to any unit employees for that time period. Consistent with this position, the Employer refused to pay all employees, both strikers and crossovers, any shutdown pay. We reject the Employer's argument and conclude to the contrary that summer shutdown pay was an underlying term or condition of the parties' contract which survived its expiration.

In <u>Wayne's Dairy</u>, <sup>3</sup> the employer argued that its contractual obligation to make health and welfare payments expired with the contract. The ALJ, adopted by the Board, rejected this argument. The ALJ noted that the employer

<sup>&</sup>lt;sup>3</sup> Wayne's Diary, 223 NLRB 260 (1976).

was essentially making a waiver argument because it required the conclusion that the employer need not bargain with the union over the cessation of an employee benefit. 4 In General Tire, <sup>5</sup> the expired contract explicitly provided that supplemental benefits "shall be provided for 90 days following [contract] termination." The employer accordingly discontinued supplemental benefits 90 days after the contract expired, arguing that the limiting contractual language privileged that action. The Board found to the contrary, holding that language explicitly providing for the benefit post-contract expiration did only that; it did not address "what is to occur to these supplemental benefits after the old contract expires." Id at 593. The Board thus found no clear and unmistakable waiver of the union's right to bargain over the discontinuance of these benefits 90 days after the contract had expired.

In the instant case, the Employer relies upon the specificity of the expired contract language explicitly providing for vacation shutdown pay in each of the three years of the contract. As was the case in <u>General Tire</u>, supra, however, such language does not at all address what would occur <u>after</u> contract expiration. Absent language clearly addressing shutdown pay post-contract expiration, the Union did not clearly and unmistakably waive its right to bargain over that subject. The Employer therefore unilaterally changed a term or condition of employment when it discontinued shutdown pay, in violation of Section 8(a)(5). The remedy would entail backpayment of shutdown pay for all unit employees.

Finally there is nothing in the clause of the 1999-2001 contract that defeats the right of the employees to a continuation of the established practice of receiving shutdown pay. As noted above, the Employer is obligated

<sup>&</sup>lt;sup>4</sup> <u>Id.</u> at 264. The ALJ then found that the contractual language was ambiguous, lacking the requisite clarity to constitute a union waiver.

<sup>&</sup>lt;sup>5</sup> <u>General Tire & Rubber Co.</u>, 274 NLRB 591 (1980).

<sup>&</sup>lt;sup>6</sup> The clause rendering "irrelevant, null, void, and without effect the terms and conditions, of any previous written, or implied Agreement between the parties thereto" does not address the Employer's past practice and does not operate as a waiver of the Union's right to bargain over any changes to that past practice.

not to make unilateral changes in mandatory subjects prior to impasse or agreement. Also, the Union never clearly and unequivocally gave up its demand for pay during the July shutdown. In fact, the Union continued to insist on employees receiving their vacation pay despite signing the contract.

[FOIA Exemptions 2 and 5

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As to the information request, we agree with the Region that the Employer violated the Act by failing to provide to the Union the 1997 evaluation rankings for employees who were not laid off. In this regard, we note that the information is clearly relevant under the liberal discovery standard of <u>Acme Industrial</u>. 385 U.S. 432 (1967). First, the Employer may use those evaluations in

<sup>7</sup> [FOIA Exemptions 2 and 5

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<sup>8</sup> [FOIA Exemptions 2 and 5

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<sup>&</sup>lt;sup>9</sup> The New York Times Co., 270 NLRB 1267, 1273-74 (1984) (union entitled to copies of performance evaluations for a particular employee); <u>J.P. Stevens</u>, 239 NLRB 738 (1978) (union entitled to employee "efficiency" ratings).

connection with future evaluations. Second, the Union can use the evaluations to advise employees of their strengths and weaknesses as determined by the Employer and thereby afford the employees the opportunity to improve their skills and perhaps avoid a future layoff. The mere fact that there were no current layoffs did not make this relevant information otherwise irrelevant.

In conclusion, the Region should continue its proceedings against the Employer as to its failure to pay vacation pay for the scheduled July shutdown, and its refusal to provide the requested information.

B.J.K.